

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK YUZOU FUKUMOTO,

Defendant and Appellant.

G056567

(Super. Ct. No. 15WF2349)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Michael F. Murray, Judge. Affirmed.

Edward Mahler, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

*

*

*

Defendant Frank Yuzou Fukumoto pleaded guilty to a felony violation of second-degree auto burglary (Pen. Code, §§ 459, 460, subd. (b); count 1)¹, and misdemeanor violations of unlawfully acquiring access card information with the intent of using that information fraudulently (§ 484e, subd. (d); count 2),² identity theft (§ 530.5, subd. (c)(1); count 3), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 4). Defendant also admitted he had previously been convicted of robbery, a serious and violent felony (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)). The court struck the prior strike for purposes of sentencing, suspended imposition of sentence, and placed defendant on probation for three years on various terms and conditions including that he serve 364 days in the county jail.

Defendant did not do well on probation. After three probation violations for which the court reinstated probation with additional jail terms, the court revoked probation and imposed a 16-month state prison sentence on count 1 (auto burglary), and concurrent 6-month sentences on counts 2, 3, and 4. Defendant's prior strike was stricken for purposes of sentencing.

In the meantime, defendant had filed a motion under section 1170.18 (Proposition 47 petition) to reduce his felony convictions to misdemeanors. The court denied the motion concluding that because defendant had entered his guilty plea after Proposition 47 went into effect, he was not subject to its provisions and that in any event his felony conviction for auto burglary was not subject to reduction to a misdemeanor theft.

¹ All statutory references are to the Penal Code unless otherwise stated.

² Count 2 was charged as a felony, and defendant pleaded guilty to the charge in count 2. Later on, however, upon reviewing defendant's felony guilty plea form, the court concluded that defendant had actually pleaded guilty to a misdemeanor violation of the charge in count 2, not a felony. On the court's own motion, it reduced the charge in count 2 to a misdemeanor pursuant to section 17, subdivision (b).

Defendant filed a timely notice of appeal from the order denying his Proposition 47 petition, and we appointed counsel to represent him. Counsel did not argue against defendant but advised the court he was unable to find an issue to argue on defendant's behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was given the opportunity to file written argument on his own behalf, but he has not done so.

FACTS

We have examined the entire record but have not found an arguable issue. Accordingly, we affirm the order.

Defendant offered the following facts as the basis for his guilty plea. "In Orange County, California, on 10/13/15 I willfully & unlawfully entered a locked vehicle belonging to another, with the intent to commit larceny. I acquired an access card issued to another without their consent with intent to use the access card fraudulently. I acquired identifying information of another with intent to defraud. I possessed a useable amount of methamphetamine."

DISCUSSION

Pursuant to *Anders v. California* (1967) 386 U.S. 738, 744, and to assist us in conducting our independent review, counsel suggests we consider "whether the trial court erred in denying his Proposition 47 petition to reduce his felony conviction for auto burglary to theft under section 490.2." We have considered the issue and conclude it is not reasonably arguable.

First, by the terms of section 1170.18, subdivision (a), defendant was not eligible for Proposition 47 relief, no matter what his offense. Proposition 47's ameliorative relief is available only to those who have *previously* suffered a felony

conviction for an offense *later* reclassified as a misdemeanor. “A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing” (§ 1170.18, subd. (a), italics added.) Section 1170.18 does not permit a defendant to plead guilty to a felony *after* November 5, 2014, and then petition to reduce the conviction to a misdemeanor. Defendant entered his plea on December 11, 2015, more than a year after the effective date of Proposition 47.

Second, even if Proposition 47 were available to defendant, his offense of auto burglary is not subject to reduction to a misdemeanor under section 490.2. Section 490.2 applies only to theft offenses. And auto burglary is committed by entering a locked vehicle with intent to commit larceny. A completed theft is not an element of the crime. (See § 459 [“Every person who enters any . . . vehicle as defined by the Vehicle Code, when the doors are locked, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary”].) That conclusion is also made plain by the list of offenses made eligible for resentencing under section 1170.18. Burglary offenses are not listed therein. Thus, as held in *People v. Acosta* (2015) 242 Cal.App.4th 521, defendant’s “effort to bring . . . car burglary within the purview of Proposition 47 fails, as *neither car burglary nor its attempt is mentioned in the list of statutes reduced to a misdemeanor.*” (*Id.* at p. 526, italics added.)

Accordingly, defendant was not eligible for Proposition 47 relief. We have reviewed the entire record searching for any other arguable issue but have not found one. Counsel’s assessment of this appeal was correct.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.